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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No. 560

BOARD OF SATANTA JOINT RURAL HIGH SCHOOL DISTRICT No. 2, WILLIAM H. HELTON and ELWIN ANTHONY, Individually and As Members of Said Board,
Appellants,

vs.

THE HASKELL COUNTY PLANNING BOARD and the Members Thereof, HAROLD LOWER, RUSSELL WINTERS, WESLEY LUCAS, CHARLES McDONALD, ELWIN ANTHONY and JOE STARKE, and ADEL THROCKMORTON, State Superintendent of Public Instruction,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS.

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE SUPREME COURT OF KANSAS.

JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the Supreme Court of Kansas filed July 14, 1966, affirming a decision of the District Court of Haskell County, Kansas. Appel-

lants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The decision of the Supreme Court of Kansas is reported in Volume 197 of the Advance Sheets of The Kansas Reports at Page 321. A copy of that opinion is attached hereto as Appendix A.

JURISDICTION

Jurisdiction of this Court is conferred by 28 U.S.C., § 1257(2).

QUESTION PRESENTED

Where the legislature has directed that the election process be invoked to determine whether the electors are in favor of, or opposed to a stated proposition, and the result of that election is in favor of the proposition, and a state administrative official is permitted to overrule the majority will duly expressed through the election process—Does a determination that the legislature may invoke the election process to function solely as an advisory device to a state administrative official constitute such an abuse of the election process so as to deny appellants due process of law?

STATUTES INVOLVED

Kansas Statutes Annotated, Article 67, entitled Unified School Districts, § 72-6734 *et seq.* and, in particular, § 72-6743, copies of which are attached hereto as Appendix B.

STATEMENT

The case at bar is a companion case to *Board of Satanta Joint Rural High School District No. 2 et al.* v. *Grant County Planning Board et al.*, which is presently docketed and pending on appeal in the United States Supreme Court as Case No. 1374, October Term, 1965.

In both cases the question presented herein was thoroughly briefed and argued. In both cases, appellants have strenuously contended that the legislation in question, as applied, is such a debasement of the election process so as to constitute a denial of due process to appellants herein. The position taken in opposition by the Attorney General of the State of Kansas is epitomized in his opening statement before the Supreme Court of Kansas. He stated that the election afforded by the statute was designed as a mere "relief valve", since *"The Legislature and everybody knows that the people do not know anything about school boundaries."* In affirming this case the Supreme Court of Kansas necessarily adopted and approved of this cynical view of the electorate and cavalier treatment of the electoral process upon which our government is based.

For the sake of clarity, the instant case will hereinafter be referred to as the *Haskell County* case, and its companion case will be referred to as the *Grant County* case. As acknowledged by the Supreme Court of Kansas:

> "The facts in the instant case are similar to those involved in the companion case. The issues of law appear to be identical in the two actions. . . ." (Appendix A, R. 17).

Both cases involve the constitutionality of Kansas Statutes Annotated, Article 67, entitled Unified School Districts, § 72-6734 *et seq.* and, in particular, § 72-6743 as construed by the Supreme Court of Kansas.

At all times material herein, a portion of the Red Rock Common School District, situated along the eastern edge of Grant County, Kansas, also formed a part of the territory of appellants' joint rural high school district. Section 10 of the School Unification Act of 1963, K.S.A. 72-6743 denominates such overlapping territory as a "gray-area" and prescribes special procedures for the transfer of such "gray-areas" to a county planning unit.

With respect to the transfer of such areas, K.S.A. 72-6743 provides that an election be held to determine the desires of the gray-area electors and describes the procedure to be followed in conducting the election. Among other things, the legislature required: (1) that the county school superintendent in which the main high school building is located call a "meeting of the electors of the gray-area"; (2) that notice be given to the resident electors of the gray-area advising them of the time and place of such meeting; (3) that the purpose of the meeting be explained to the resident electors and discussion be held concerning the matter of transfers; (4) that ballots be distributed to each elector; (5) that each elector present mark his ballot for or against the transfer of the territory; and, (6) that each ballot then be returned to the county superintendent and that "He shall count and tabulate the same and thereafter file such ballots in the public records of his office." In short, the Kansas legislature required the invocation of the traditional election process with which each American is familiar.

The statute further provides that in the event that a majority of the electors residing in a particular gray-area are in favor of the transfer of such gray-area to the planning unit where the main rural high school building is located, the two planning boards involved shall consider the

advisability of such a transfer. If either one, or both, of the planning boards are in favor of the transfer, "the same *shall be transferred, subject only to the approval thereof by the state superintendent* . . ."

Appellants' main high school building is located in Haskell County and pursuant to K.S.A. 72-6743, a special election was called by the County Superintendent of Schools of Haskell County for September 1, 1963. Notice of the election was posted and publicized. Eighty-five per cent of the resident "gray-area" electors attended. The question of transfer to the Grant or Haskell County Planning Unit was publicly debated. Ballots were issued and a secret vote held. A clear majority of the electors chose to transfer the gray-area to the Haskell County Unit. (R. 4-5) *Grant County* case.

In accord with K.S.A. 72-6743 the election results were certified to the Haskell and Grant County Planning Boards. The Haskell County Planning Board adopted a resolution favoring the transfer. The election results and the board resolution were then certified to the State Superintendent of Public Instruction.

The Superintendent, under a broad construction of the word "approval", did not "approve" of the *results* of the election, and issued an order refusing to transfer the gray-area in direct contravention of the electoral determination, and concurring resolution of the Haskell County Planning Board. (R. 87) *Grant County* case. This determination gave rise to the *Grant County* case now pending in this Court.

Thereafter, the Grant and Haskell County home planning boards each submitted to the State Superintendent of Public Instruction a plan pursuant to Section 11 of such Act, each of which plans defined proposed districts including the gray-area located in appellant's district. The Super-

intendent approved the plan of the Grant County Planning Board and disapproved Haskell County Board's plan, but such disapproval was not announced by the State Superintendent until after an election was held upon the plan of the Grant County Planning Board. (R. 4)

The Haskell County Planning Board then submitted another document to the Superintendent delineating the territorial extent and boundaries of unified school districts within an area which did not include the gray-area within appellant's school district. By such submission, the Haskell County Board did not make a recommendation as required by the Act, but on the contrary indicated that appellees had not had time to give the matter full consideration, that such submission was the product of duress, and was reported entirely under protest. (R. 4)

Notwithstanding the failure of the Haskell County Board to submit a recommended plan in accordance with law, said Superintendent ignored such failure and undertook to issue his "unconditional approval" of the purported plan submitted, treating the same as a recommended plan under Section 13 of the Act, and undertook to authorize the Board to hold an election on September 8, 1964, for approval of a purported plan, excluding appellants' gray-area territory. (R. 4)

Appellants then filed the instant action seeking a declaratory judgment determining the legality of such acts of the Superintendent and of the constitutionality of the legislation as applied. In addition, appellants requested a restraining order enjoining the Haskell County Planning Board from certifying the results of the scheduled election. (R. 2-6) The lower court issued a restraining order restraining such certification. (R. 6) However, the resident election of the "gray-area" voted against the purported plan

which excluded their gray-area territory from the Haskell County Planning Unit, and the Restraining Order was dissolved "without prejudice to any claims of any of the parties hereto. . ." (R. 6-7)

On October 7, 1964, appellants filed a class action claim on behalf of all of the resident electors of Satanta Rural High School No. 2 challenging the constitutionality of the legislation as applied. (R. 7-10) On October 4, 1965, the trial court granted appellees' motions for Summary Judgment and to dismiss. (R. 19)

Appellants appeal from a judgment of the Supreme Court of Kansas filed July 14, 1966, affirming the decision of the District Court of Haskell County, Kansas. The purpose of this appeal is to review the constitutionality of the legislation as applied.

The constitutional question was raised in the lower court (R. 2-20), and was acknowledged by the Kansas Supreme Court to be the same issue as presented by the *Grant County* case. In each case, the Supreme Court of Kansas ignored the issue, although it was thoroughly briefed and argued in each instance.

THE QUESTION IS SUBSTANTIAL

The issue presented by this appeal is whether the legislative use of the election process as a mere public opinion poll, straw vote, or "relief valve", violates due process of law. So far as we can tell, the question has never been decided by this Court.

The statement by the Attorney General that: *"The legislature and everybody knows that the people do not know anything about school boundaries."*, clearly demonstrates the bad faith on the part of the Kansas Legislature in requiring that elections be held. If the people know

nothing about school boundaries, the Legislature should not have invoked the election process to function as a mere sop thrown to an unwary public and intended to constitute a "relief valve" in the political arena.

Appellants submit that the election process can never be used as a mere advisory mechanism or "relief valve" because: (1) elections are by definition determinative of the issue at hand; (2) the existence of "determinative" and "advisory" elections side by side can only have the effect of diminishing the active participation of responsible citizens in the elections actually necessary for the existence of our republican form of government at both state and national level; and, (3) "advisory" elections are alien to the concept of a government responsive to the expressed will of its people.

It is elementary that the Federal Constitution protects the right of all qualified citizens to vote, in state as well as federal elections, *Reynolds* v. *Sims*, 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362 (1964). It is equally rudimentary that the Federal Constitution guarantees each voter the right to have his ballot counted, *U. S.* v. *Mosley*, 238 U.S. 383, 59 L.Ed. 1355, 35 S.Ct. 904 (1915). These basic principles are grounded on the even more fundamental premise that elections are decisive of a given proposition. This is so because it is the people who govern:

> "The very foundation of a true democracy and the foundation upon which this nation was built is the fact that government is responsive to the views of its citizens." *Braden* v. *U. S.*, 365 U.S. 431, 5 L.Ed.2d 653 at 661-2 (1961).

> "Under our Constitution it is We the People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation." *U. S.* v. *U.A.W.*, 352 U.S. 567 at 593 (1957).

The issue is not whether the residents of the gray-areas had the right to vote on the question of transfer. The issue, may the legislature invoke the election process, even though it has no intention of abiding by the electoral determination thereby expressed? Appellants submit that due process requires a negative answer. If a qualified citizen has the right to vote, and the right to have his vote counted, does he not have the right to have the election dispose of the issue? For what other reason is an election held if it is not to be determinative of the issue at hand?

"Advisory" elections which serve only as a "relief valve" are repugnant to our form of government, which is based on the concept of government by the people. It is beyond question that the people of this country govern. They are not mere advisors, as held by the Kansas Supreme Court. According to the Declaration of Independence and the Federal Constitution, it is the people who are sovereign and who are the very wellspring of all power. To turn them into mere advisors on public issues is to make the people the servant of government rather than its master.

Take the case at bar. Here the electors participated in the traditional process of free election on a subject of vital interest to them. The majority will was clearly expressed. Nevertheless, it was ignored as "mere advice" and one administrative official was able to overrule the majority will duly expressed through the election process. Is this not precisely the type of situation which the founding fathers sought to prevent? The answer is most assuredly "yes", and this Court now has the opportunity to stop this beginning intrusion of utter disregard for the majority will. Due process so requires.

To permit the existence of "determinative" and "advisory"[1] elections, side-by-side, not only gives impetus to

a general erosion of our democratic processes, but also discourages responsible citizen participation in elections required by our Constitutions and without which our republican form of government would not exist.

From childhood through adolescence to maturity, the American citizen is properly and necessarily nourished on the concept that elections are held to determine how the government will govern. He is taught at home, in church and in school that it is a citizen's highest duty to participate in the election process. It is essential to the Republic that citizens take seriously their right to vote if we are to achieve a government of, by and for the people. Permitting "advisory" and "determinative" elections to exist side-by-side can only lead to confusion and uncertainty.

The situation here is a good example. The legislature directed that the election process, with all of its attendant formalities, be invoked. The electors responded as model citizens. Eighty-five per cent of all eligible electors participated in what they quite properly believed to be a traditional democratic decision-making process. They left their homes, farms and places of business at their own expense of time and money. They argued, debated, studied and discussed an issue of vital interest to them—an issue they felt that had been left to their judgment. A secret ballot was taken, the results recorded and a majority view expressed. The electors had exercised their privilege and discharged their duty. But this was an election that turned out to be unlike any election with which they, as American citizens, had been familiar. Instead of deciding the controversy, *it functioned solely as a public opinion poll to advise a single administrative official!*

For the Court to place its stamp of approval upon this type of sham election would result in an attrition of re-

spect for the democratic decision-making process. Who would ever want to vote in a meaningless election, and how would a person ever know with certainty which elections were meaningful and which were not?

It is submitted that the decision of the Kansas Supreme Court is violative of the integrity of the election process by permitting its use as a mere "relief valve" or advisory device. Appellants sincerely believe that this question is substantial and of the utmost public importance.

Respectfully submitted,

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APPENDIX A

The opinion of the court was delivered by

Kaul, J.: This is an appeal from a summary judgment of the district court entered in favor of defendants-appellees, The Haskell County Planning Board and the Members thereof, in a declaratory judgment action. Plaintiffs-appellants also appeal from an order of the district court dismissing the action as to the defendant, appellee, Adel Throckmorton, State Superintendent of Public Instruction.

The action arises out of the same controversy involved in a companion case entitled: *Board of Satanta* v. *Grant County Planning Board*, 195 Kan. 640, 408 P.2d 655, decided by this court on December 11, 1965.

The facts in the instant case are similar to those involved in the companion case. The issues of law appear to be identical in the two actions and on oral argument, before this court, appellants' counsel conceded such to be the case.

The same basic question was presented in both cases: Is the State Superintendent authorized to conclusively determine whether "gray-area" shall be transferred from one planning unit to another? The question was resolved in the affirmative in *Board of Satanta* v. *Grant County Planning Board*, supra, and that opinion is adopted and incorporated herein as controlling and determinative of the issues raised in this appeal.

It would serve no useful purpose to restate the reasons for our previous decision.

The judgment is affirmed.

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APPENDIX B

Kansas Statutes Annotated

Article 67.—UNITIFED SCHOOL DISTRICTS ACT OF 1961

72-6734. Legislative declaration, liberal construction. The legislature hereby declares that this act is passed for the general improvement of the public schools in the state of Kansas; the equalization of the benefits and burdens of education throughout the various communities in the state; to expedite the organization of public school districts of the state so as to establish a thorough and uniform system of free public schools throughout the state whereby all areas of the state are included in school districts which maintain grades one (1) through twelve (12), and kindergarten where desired; and to have a wiser use of public funds expended for the support of the public school system of the state. To these ends this act shall be liberally construed. [L. 1963, ch. 393, § 1; May 15.]

72-6735. Definitions. As used in this act, unless the context otherwise requires:

(1) The term "state superintendent" means the state superintendent of public instruction.

(2) The term "county superintendent" means county superintendent of public instruction.

(3) The term "planning unit" means one of the primary units of organization that the territory of the state is divided into by this act for the purpose and function of planning the territorial extent and boundaries of proposed unified districts of the state, with every planning unit being under the general supervision of the state superintendent, and the functions of each planning unit being

independently administered locally under authority conferred by this act upon one individual planning board for each planning unit.

(4) The term "home county" means: (*a*) as applied to a planning unit or planning board, the particular county with which a particular planning unit, or planning board, is principally associated and mainly related in territory and residents, such that more than one-half of the area of such particular county is included in such particular planning unit; and (*b*) as applied to unified districts, the county designated by the state superintendent in his organization order as the home county of the unified district; and (*c*) as applied to a proposed unified district, the county so designated in recommendations unconditionally approved by the state superintendent.

(5) The term "planning board" means one of the six member administrative bodies provided to be established by this act, upon which this act imposes certain planning duties and functions and confers authority to carry out such planning.

(6) The word "board" means one of the unified school district boards of education provided for by this act and such board being the governing body of a unified district.

(7) The term "unified district" means a school district organized under the authority of this act.

(8) The term "city district" means the school district of a board of education of a city of the first or second class.

(9) The term "boards of city districts" means boards of education of cities of the first and second class.

(10) The term "board of the city district" means the board of education of a city of the first or second class.

(11) The term "selection committee" means one of the organizational bodies provided to be established by this act, and the sole function of each such body being the selection of all or part of the members of the planning board for the planning unit of such selection committee.

(12) The term "disorganized district" means any school district of any type disorganized pursuant to this act. [L. 1963, ch. 393, § 2; May 15.]

72-6736. Planning units; territorial extent; board; Shawnee Mission declared urban area. (a) All of the territory of the state is hereby divided into one hundred and six (106) planning units such that there is one planning unit for each county in the state except Johnson which shall have two (2) planning units, one (1) of which shall be comprised of the territory of rural high-school district No. 6 (Shawnee Mission) and the other of which shall be the territory which, under the provisions of this act, comprises the planning unit of Johnson county except for said rural high-school district No. 6. Each planning unit shall consist of the following: (1) All of the territory within every common-school district, the main school building of which is located in the home county of such planning unit unless such common-school district has more than one main school building, in which case the provisions next following shall apply, and (2) all of the territory within every common-school district which has more than one main school building and the greater part of the territory of which is in the home county of such planning unit, and (3) all of the territory within every city district of such home county, and (4) all of the territory in such home county that is not in any common-school district.

An individual planning board shall be selected for each planning unit. Each planning board shall have authority over and responsibility for the planning unit of residence of the members of such planning board, and such authority and responsibility shall be for the purposes, functions, duties and period specified in this act. The members of each planning board shall be selected and each planning board shall be constituted as provided in this act.

(b) The territory comprising (Shawnee Mission) rural high-school district No. 6 of Johnson county, Kansas, is hereby designated and declared to be an urban area for the purposes of this act. [L. 1963, ch. 393, § 3; May 15.]

72-6737. Selection committee of planning unit; membership; certification; duties of county superintendent; first meeting; chairman and secretary; certification of selection of members of planning board. On or before June 1, 1963, the boards of school districts of every type, all or the greatest part of the territory of which is located within each individual planning unit, except board of city districts shall each select one of its members to serve as a member of the selection committee of the planning unit. The clerk of each such board shall certify the name and mailing address of the members so selected to the county superintendent of the home county of the planning unit. On or before June 4, 1963, each such county superintendent shall compile a list of names of members so certified, and the persons named on such list shall comprise the selection committee for such planning unit.

Each selection committee shall meet on or before June 15, 1963, to make the selections herein provided. Each county superintendent shall call the first meeting of his selection committee, stating the time and place of such meeting in a written notice thereof, which he shall mail

to each member on such list at least two (2) days prior to such meeting.

The county superintendent of the home county of the selection committee shall be an ex officio member of the selection committee, without vote, and shall serve as secretary of the selection committee. Each selection committee shall elect one of its members chairman. Such chairman shall serve until the duties of the selection committee are completed. After the selection committee has made its selections, the names of the members of the planning board selected by such selection committee shall be certified by the county superintendent to the state superintendent no later than two (2) days after the date of the selection committee meeting. Boards of city districts shall certify the names of the planning board members selected by them to the state superintendent within two (2) days after such selections are made. [L. 1963, ch. 393, § 4; May 15.]

72-6738. Planning boards; composition; selection; qualifications. (*a*) Where there is no city district in a planning unit, the selection committee of such planning unit shall select six (6) persons who are resident electors of the planning unit to be members of the planning board of such planning unit as provided in subsection (*e*) of this section.

(*b*) If there is one and only one city district in a planning unit, the planning board of such planning unit shall have six (6) members selected as follows: The selection committee shall choose three (3) persons who are resident electors of the planning unit but who reside outside of such city district, and the board of such city district shall choose three (3) members, who are resident electors of the planning unit and who reside inside of such city district.

(c) If there are two (2) or more city districts in a planning unit, the planning board of such planning unit shall have six (6) members selected as follows: The county superintendent shall call a meeting of the boards of city districts in the planning unit. Such boards shall jointly select three (3) members who are resident electors of such city districts, and the selection committee shall select three (3) members, who are resident electors of the planning unit but who reside outside of such city districts.

(d) Selections to be made by boards of city districts shall be made on or before June 15, 1963.

(e) If there is no city district in the planning unit, the selection committee shall choose (1) three persons each of whom resides and owns real property within a third class city or a second class city not having a board of education, and (2) three members who reside outside of such cities.

(f) In any planning unit over half of the territory of which is comprised of school districts organized pursuant to section 72-6608 of the General Statutes Supplement of 1961 *et seq.*, the members of the planning board from city districts shall be chosen as above provided, and the three members not from city districts shall be selected as follows: Each board of education of a district organized pursuant to said section 72-6608 shall appoint one member to the planning board.

(g) No planning board member shall be an employee of any school board and none shall be an elective official of any city, county or the state. [L. 1963, ch. 393, § 5; May 15.]

72-6739. Filling vacancies on planning board. In the event of resignation, death or other disqualification of a planning board member, who was selected by a selection committee, the chairman of the selection committee shall

recall the selection committee and select a properly qualified member to fill such vacancy. In the event of resignation, death or other disqualification of a planning board member who was selected by one or more boards of city districts, then, the board or boards who selected such member shall select a properly qualified member to fill such vacancy. [L. 1963, ch. 393, § 6; May 15.]

72-6740. Failure to select planning board members; duty of state superintendent. In the event that a duly constituted planning board has not been selected in any planning unit by July 1, 1963, the state superintendent shall select and appoint members of the planning board as follows: (1) If neither the selection committee nor the city boards of a planning unit have duly selected members of the planning board, then, the state superintendent shall select and appoint any six (6) persons who qualify as provided in section 5 [72-6738] of this act to be members of such planning board or, (2) if the selection committee has duly selected members for the planning board but the city board or boards in such planning unit have failed to make their selections, or if the city board or boards have duly selected members for the planning board but the selection committee has failed to make its selections, then in either event the state superintendent shall appoint persons who qualify as provided in section 5 [72-6738] of this act to be members of such planning board in lieu of the members who should have been selected but were not. [L. 1963, ch. 393, § 7; May 15.]

72-6741. Organization of planning board; meetings; funds; increase in compensation of county superintendent, when; state participation. Each planning board shall hold its first meeting on or before July 3, 1963. The planning board shall elect one of its members to be chairman and

another member to be vice-chairman. Place and time of later meetings and other business of such board shall be determined and conducted as such board deems proper, so long as the board actions do not conflict with this act and so long as the board performs the duties directed by this act.

The county superintendent of the home county of the planning board shall serve as its secretary and shall perform such duties as it directs. The board of county commissioners of the home county of the planning board shall provide funds for the planning board in accordance with the reasonable requests of the planning board. Such funds shall be used for attorney fees, office expense, clerk and secretarial hire, travel and subsistence expense, and for postage and miscellaneous expenses of the planning board, within the financial limits provided by the board of county commissioners of the home county. Commencing on July 1, 1963, the salary of each county superintendent shall be increased in the amount of twenty dollars ($20) per month for a period to end when the reorganization needs are substantially ended as hereinafter provided, but such period shall not exceed two (2) years. Such expenditures of the planning board and election expenses paid by the county as provided for in this act shall be paid from the general fund of the home county and shall be vouchered and paid as other county expenses, except that the provisions of the budget law of the state shall not apply to such expenditures made in the year 1963. Fifty percent (50%) of the total amount so paid each month from the county general fund shall be reimbursed out of funds appropriated therefor in the state treasury. The state controller is hereby authorized to draw his warrants therefor on the state treasurer payable to the county treasurers of the proper counties for such reimbursements upon the

presentation of duly itemized and verified vouchers of the various boards of county commissioners. Upon receipt thereof the county treasurers shall credit the same to the county general fund.

The state superintendent shall keep himself informed of the reorganization financial needs of each of the county superintendents' offices of the state. When such needs, including disorganization needs, are substantially ended the state superintendent shall so advise the board of county commissioners, and no expenditures made after such date shall qualify for state financial participation under this section. [L. 1963, ch. 393, § 8; May 15.]

72-6742. Planning board recommendations; listing and summary; hearing requirements; duties of state superintendent. Each planning board, in formulating its recommendation to the state superintendent for territorial extent and boundaries of unified districts as herein provided, shall complete a study which shall consist of the following: Such board shall make a listing of the types of school districts in its planning unit which listing shall show for each, the school enrollments, enrollment trends, educational program offerings at kindergarten, elementary and secondary grade levels including special services in areas of health, physical education, music, art, special education programs, vocational and trade courses, and counseling and guidance services. Such board shall prepare a summary explaining the most important facts concerning utilization of school facilities, financial data relating to assessed valuation, assessment ratios, mill levies for school purposes, bonded indebtedness, capital investment; school transportation including bus routes, roads, number of students transported, and terrain and topography of the planning unit, as such matters exist in the planning unit. The list and summary

to be made pursuant to this section shall constitute a public document and shall be made available to residents of the planning unit on or before January 1, 1964.

The hearings required by section 11 [72-6744] of this act are expected to be informative to the members of the planning board, and should be conducted in an orderly and studious manner. Each planning board is directed to give careful attention to social and economic characteristics and needs of areas and groups of people along the boundaries of the planning unit. Each planning board should conduct hearings in such a way that there is ample opportunity for the planning board members to become advised of such characteristics and needs. The list and summary provided for in this section should reflect the information so derived. Such list and summary shall accompany the recommendations of the planning board when submitted to the state superintendent.

The state superintendent and his staff shall aid, advise and assist each planning board in the performance of its study duties by furnishing literature suggesting procedures, methods, forms, diagrams or maps and any other necessary or suitable materials for such study; and by providing consultation services to the extent practicable, within appropriations made therefor by the legislature. [L. 1963, ch. 393, § 9; May 15.]

72-6743. Gray-area territory; transfers; elections; approval by planning board or boards and by state superintendent; order by state superintendent. As used in this section, the term "gray-area" means any part of a joint rural high-school district which is not (under the provisions of section 3 [72-6736] of this act) located in the same planning unit as the main school building of such joint rural high-school is located.

On or before October 1, 1963, there shall be held a meeting of the electors residing in each gray-area in the state. At least ten (10) days prior to any such meeting the county superintendent of the county in which such a main school building is located shall post notices in three conspicuous places in each gray-area, notifying the resident electors of such gray-area of the time and place of such meeting. The purpose of each such meeting shall be to determine whether it is the desire of such electors that such gray-area be transferred from the planning unit in which such gray-area is located to the planning unit in which the main school building of such rural high-school district is located. Such county superintendent shall attend each such meeting and serve as chairman thereof. He shall explain to the persons present the purposes of the meeting and permit discussion by interested persons. After such explanation and discussion, the county superintendent shall distribute one (1) ballot to each such elector residing in such gray-area who is in attendance at such meeting. Such ballots shall be prepared so that such elector may vote in favor of transfer of such territory or against transfer of such territory. Each ballot shall then be returned to the county superintendent, and he shall count and tabulate the same and thereafter file such ballots in the public records of his office. If a majority of such ballots in any particular gray-area are in favor of the transfer of such territory, the county superintendent shall so declare and certify such fact to the chairman of the planning units involved.

Upon receipt of a certification that a majority of the electors residing in a particular gray-area are in favor of the transfer of such gray-area to the planning unit where the rural high-school building is located, the two planning boards involved shall consider the advisability of such

transfer. If either one or both of such planning boards are in favor of such transfer, the same shall be transferred, subject only to the approval thereof by the state superintendent as hereinafter provided. The chairman of each of such planning boards shall promptly, and prior to October 5, 1963, report to the state superintendent the result of the vote taken in each gray-area and the desire of his planning board with respect to such transfer. Upon the receipt of any such report the state superintendent shall determine whether such gray-area shall be transferred from one planning unit to the other, and shall promptly issue an order transferring the same or refusing to transfer the same. Such determination by the state superintendent shall be conclusive, and upon issuance of his order for any transfer under the provisions of this section, such gray-area shall be included in and be a part of the planning unit to which it is transferred by such order. [L. 1963, ch. 393, § 10; May 15.]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No. 560

BOARD OF SATANTA JOINT RURAL HIGH SCHOOL DISTRICT No. 2, WILLIAM H. HELTON and ELWIN ANTHONY, Individually and As Members of Said Board,
Appellants,

vs.

THE HASKELL COUNTY PLANNING BOARD and the Members Thereof, HAROLD LOWER, RUSSELL WINTERS, WESLEY LUCAS, CHARLES McDONALD, ELWIN ANTHONY and JOE STARKE, and ADEL THROCKMORTON, State Superintendent of Public Instruction,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS.

MOTION TO DISMISS

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS.

MOTION TO DISMISS

Appellees move to dismiss on the grounds that the federal question sought to be reviewed was not timely raised or expressly passed on below and that the question presented is so unsubstantial as not to need further argument.

QUESTION PRESENTED

Where a state legislature, consistently with state constitutional provisions, delegates to a state official the final responsibility for fixing school district boundaries, does a provision that an election within a particular area as to which district it should be attached shall be advisory only deny electors in that area due process of law?

STATEMENT

As indicated by the Jurisdictional Statement, this case is identical to *Board of Satanta Joint Rural High School District No. 2 et al.* v. *Grant County Planning Board et al.*, No. 192, October Term, 1966, appeal dismissed ..... U.S. ....., October 10, 1966. The plaintiffs are the same, the question presented is the same, and the territory in dispute is the same. In both cases the gist of the action is the appellant school board's dissatisfaction with the refusal of the Kansas state superintendent of public instruction to transfer certain territory in Grant County to Haskell County for school boundary planning purposes.

The only difference is that this case originated in the District Court of Haskell County, Kansas, and the Haskell County planning board was named as defendant, along with the state superintendent, whereas the earlier case originated in the neighboring county of Grant and named the Grant County planning board as the superintendent's co-defendant.

In short, this case is nothing more than an attempt by a defeated litigant to retry his cause in another forum. The trial court recognized it as such by granting summary judgment, and the Kansas Supreme Court summarily disposed of the appeal in an almost unprecedented one page opinion (Jurisdictional Statement, Appendix A).

ARGUMENT

Despite appellants' allegations in the jurisdictional statement, an examination of their pleadings in the trial court reveals no single mention of the United States Constitution. The court below disposed of the appeal by incorporating by reference its opinion in the previous case, *Board of Satanta* v. *Grant County Planning Board,* 195 Kan. 640, 408 P.2d 655 (1965). No federal question was decided in either case.

The one posed, as was pointed out in the *Motion to Dismiss* filed in this Court in the Grant County case (No. 192, supra), is so insubstantial as to require no argument. Appellees refer the Court to and rely on that Motion.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this appeal should be dismissed.

Respectfully submitted,

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS.

BRIEF OPPOSING MOTION TO DISMISS

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THE HASKELL COUNTY PLANNING BOARD and the Members Thereof, HAROLD LOWER, RUSSELL WINTERS, WESLEY LUCAS, CHARLES McDONALD, ELWIN ANTHONY and JOE STARKE, and ADEL THROCKMORTON, State Superintendent of Public Instruction,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS.

BRIEF OPPOSING MOTION TO DISMISS

The disposition of a companion case[1] by this Court on October 10, 1966, should not control the disposition of this cause.

1. *Board of Satanta Joint Rural High School District No. 2 et al.* v. *Grant County Planning Board et al.*, No. 192, October Term, 1966, ... U.S. .....

Unlike such previous case, this cause was a suit for declaratory judgment brought as a class suit on behalf of *resident electors.* Appellants relied in their briefs and in their oral arguments solely upon the grounds that the statute, as further applied, violated constitutional rights of resident electors under the First and Fourteenth Amendments to the United States Constitution, asking for a judgment declaratory of their rights thereunder.[2]

Appellees also briefed and argued the merits of appellants' constitutional contentions.[3]

The statement of the Attorney General of Kansas, made before the Kansas Supreme Court in argument below, that the election procedure in question was designed merely as a *"safety valve,"*[4] since *"The Legislature and everybody knows that the people do not know anything about school boundaries"* amply demonstrates the position taken by appellees below to justify the statute, as applied, in order to avoid appellants' constitutional attack.

The Supreme Court of Kansas decided the case on the merits and not on state grounds. The only question presented on the merits below is the very question here on appeal. While the opinion below, for some reason, did not "expressly" discuss the federal question, the judgment of that court necessarily decided, adversely to appellants, the

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2. See excerpts from Brief of Appellants in the Supreme Court of Kansas, attached as Appendix "A" hereto.

3. See excerpts from Brief of Appellee Adel F. Throckmorton, State Superintendent of Public Instruction, attached as Appendix "B" hereto. Appellees sought to have the appeal in the Court below *dismissed* because of alleged procedural defects stated as Points I and II (mootness and no controversy exists). But the Supreme Court of Kansas did not dismiss the appeal, but, rather decided the appeal on its merits, *affirming* the judgment below (Jurisdictional Statement, p. A1).

4. This is in accord with *Board of Satanta* v. *Grant County Planning Board,* 195 Kan. 640, at 647, where the Kansas Court stated that "the legislature may *use* the vote of electors in such capacity *as it sees fit.*"

only question before it for decision on the merits—the federal question presented here.

Appellees are therefore incorrect in suggesting, for the first time in this Court, that the federal question sought to be reviewed was not timely raised. They are also obviously incorrect in stating that the federal question was not passed upon below.

We respectfully urge that the novel and cavalier effort in Kansas to transform traditional election procedures into devices for the sole purpose of administering mere straw votes or public opinion polls constitutes such an abrasive and corrosive attack on necessarily determinative election procedures as to violate due process requirements of our Federal Constitution.

We further urge that political considerations making it convenient for the legislature to use such a device as a mere gesture or "safety valve" to avoid outrage from the unsuspecting public are insufficient to remove such constitutional objections, and that euphemistically describing the device as "advisory"[5] does not so change the nature of the device so as to escape such constitutional objections

Respectfully submitted,

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5. *Board of Satanta* v. *Grant County Planning Board*, 195 Kan. 640, at 647.

*Counsel upon whom service is to be made.

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APPENDIX "A"

No. 44,518

IN THE

SUPREME COURT OF THE STATE OF KANSAS

THE BOARD OF SATANTA JOINT RURAL HIGH SCHOOL DISTRICT No. 2 and the Members Thereof, CARLYLE KIEHNE, WILLIAM HELTON and ELWIN ANTHONY, Individually and As Such Members,
Appellants,

vs.

THE HASKELL COUNTY PLANNING BOARD and the Members Thereof, HAROLD LOWER, RUSSELL WINTERS, WESLEY LUCAS, CHARLES McDONALD, ELWIN ANTHONY and JOE STARKE, and ADEL THROCKMORTON, State Superintendent of Public Instruction,
Appellees.

APPEAL FROM THE DISTRICT COURT OF HASKELL COUNTY, KANSAS.

HONORABLE LANGDON L. MORGAN, JUDGE.

DISTRICT COURT NO. 2746.

BRIEF OF APPELLANTS

NATURE OF ACTION

This is a class action brought on behalf of all of the resident electors of the Satanta Joint Rural High School District No. 2 of Grant and Haskell Counties, Kansas, in which it is contended by such electors that the provisions of the First Unification Act (1963), K.S.A. 72-6734 *et seq.* as it relates to the election process, violates due process of law.

* * *

ARGUMENT AND AUTHORITIES

K.S.A. 72-6743, and 62-6745 and 6746, as interpreted and applied herein, violate the First and Fourteenth Amendments of the United States Constitution because they deny due process of law to the electors involved.

* * *

When the Grant County case was before this Court, all of the aspects of this single controversy were not a matter of record. In view of the expanded records revealing the controversy now before the court, we respectfully suggest that the court should strike down the provisions of the Act as interpreted and applied in this case as being violations of the electoral processes upon which the State and our Nation are based and have their strength.

Under K.S.A. 72-6743 the appellant "electors" were officially called out of their various walks of life with the reasonable expectation created by statutory language that they were exercising the procedural steps traditionally designed to implement those rights "endowed by their Creator" mentioned in the Declaration of Independence. See Volume 6, Kansas Statute Annotated, p. 790. They also reasonably expected that in leaving their various places of business and homes, at a willing sacrifice of money and

convenience, that they were participating in that "consent of the governed" mentioned in the Declaration.

Called, as they thought, by the highest duty of a citizen, they proudly came in large numbers to participate in the electoral process. Employers, at financial loss to them, undoubtedly excused their employees from their work so that they could vote. Farmers and housewives left their work and answered the call to ballot.

In addition, the electors, in reasonable reliance upon and in anticipation of the call to ballot, and its importance, participated in the exhilarating activities which always accompany elections. They studied, they argued, they held meetings, they encouraged one another to vote, they arranged for rides for one another. Their state of mind was such as to prepare them for serious and active participation in the traditional decision-making electoral process. Great expectations were in the air. What would the all-important decision be? What would be the expressed decision of the people which would govern the destiny of this Western Kansas area in a most important aspect of its life?

Counsel are unable adequately to describe the sense of shame and hurt which understandably embraced the community when it was learned that the interpretation was that (1) when the electors voted against transfer in some gray-areas, the vote of the people was final and binding regardless of what the planning boards or the Superintendent thought, but (2) when the people voted in favor of the transfer and both planning boards opposed, the absolute joint will of the planning boards prevailed regardless of what the electors or the superintendent thought, but (3) when the people voted in favor of transfer, and the planning boards were divided, one man in Topeka could arbitrarily decide against the vote of the people, regardless of what they or the planning boards thought!

The propriety of this alternative use of the election process as having no more real ultimate meaning than a well-conducted straw vote and also as being at the same time determinative of important issues with respect to differing gray-areas involving a single planning unit was not presented in the previous Grant County case.

This on-again, off-again treatment of the electorate —this dual use of the election process both as an advisory and as a determinative measure could first be presented in this case.

We are confident that had the Court had the benefit of this record, it could not have held in *Board of Satanta* v. *Grant County Planning Board* that "the vote of the electors is merely advisory under the statute, as is the approval of the planning boards," 195 Kan. 640, at 646, and that the "legislature may use the vote of the electors in such capacity *as it sees fit* . . ." 195 Kan. 640, at 647. (Emphasis added).

* * *

Let us be clear. We do not say that, under Kansas law as now enunciated, the state superintendent could not have been empowered to define school boundaries as he might see fit.

What we do say is that the election process cannot be used in the manner it was used in this case. Such use debases and degrades the very source of our government. We do say that the statute was reasonably designed to create an expectation in the electorate that they were participating in an election—not in an advisory vote. It was so interpreted and applied, as we have shown. We say that in this case the same references to "election" and the "ballot" have been interpreted to refer both to an advisory and a binding election. We say that the result of

putting into gear such reasonable expectations by the use of such language susceptible to such meaning and associated activities and then not permitting the usual consequences to ensue undermines "real" elections and cheapens them, making the people much less likely to participate as good citizens in "real" elections when they are periodically held.

As far as we are aware, no other state has under the guise of such language called "electors" out to "ballot" for the purpose of an advisory vote.

* * *

CONCLUSION

We respectfully submit that, with an enlarged record before the court, it has been now conclusively demonstrated that the language used by the legislature to call out the electors to ballot was reasonably and effectively designed to lead the electors to believe that they were to participate in an election in the traditional sense of that word. The call to vote was so actually construed and applied as to gray-areas included in this controversy.

We submit that the court should:

(1) Construe K.S.A. 74-6743 to require the "approval" of the State Superintendent as to the procedure only, thus avoiding unconstitutional construction as applied to the Red Rock gray-area and keeping the election process inviolate.

(2) Reverse the order of the trial court, with directions to enter judgment declaratory of the rights of the parties with respect to acts complained of herein, holding void the order of the State Superintendent refusing to

transfer the Red Rock gray-area in accordance with the vote of the electors and declaring that all subsequent acts of the Superintendent or defendants including or tending to include such gray-area in the Grant County Planning Unit or excluding or tending to exclude such area from the Haskell County Planning Unit, or based upon such respective inclusion or exclusion to be null and void and of no further force or effect.

APPENDIX "B"

No. 44,518

IN THE

SUPREME COURT OF THE STATE OF KANSAS

BRIEF OF APPELLEE ADEL F. THROCKMORTON, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

NATURE OF ACTION

This originated as an action for declaratory judgment and for an injunction. After the election defeat of the unification proposal in Haskell County, the petition was amended, asking only for a declaratory judgment.

* * *

ARGUMENTS AND AUTHORITIES

I. This Appeal Has Become Moot.

* * *

II. No Controversy Exists.

* * *

III. K.S.A. 72-6743 et seq. Do Not Deny Due Process of Law to Appellants.

All argument contained in appellants' brief was directed to the issue whether appellants had been deprived of due process of law, their argument being premised upon an "abuse of the election process". This is the same argument put to the District Court in the *Grant County* case, *supra,* and was argued in appellants' brief on the appeal of that case and in the motion for rehearing of that case previously decided by this court. In fact, the five pages of their motion for rehearing in the Grant County appeal are incorporated into and substantially comprise the entire argument of their brief now before the court. Appellants are asking this court for a *rehearing* of their former motion for *rehearing* of their appeal in the Grant County case. *Without exception,* all of the authorities cited in appellants' motion for rehearing in the Grant County case are again cited in appellants' brief in the instant appeal.

The court correctly ruled on this question, that there was no violation of due process. Because appellants have no vested rights in school boundaries, they can have been "deprived" of nothing in violation of the due process amendment. The court said, in the *Grant County* decision (pages 646-7):

> "The electors have no vested right in school boundaries, nor does such right vest after they have exercised their vote in connection therewith . . . the people have, by their constitution divested themselves of all control over school boundaries and placed such authority in the hands of the legislature."

The legislature created the instrument of election in these gray area situations. The legislature then, not the electors, should have the right to say how the results of

the election would be used. This court said, in the *Grant County* case *supra* (page 644):

> "We do not know how the legislature could have made it clearer that the State Superintendent shall determine whether the gray area shall be transferred and his determination shall be conclusive."

Except for the territory involved in the *Grant County* case, *supra*, appellants' school boundaries are untouched. They enjoy the same territorial integrity as they did prior to the start of all unification in the State of Kansas under this law. There can be no violation of due process without some "deprivation of life, liberty or property".

As is evident by this law, the people residing in the gray area are not the only people concerned with this school boundary. Certainly the vastly larger number of people in both adjoining districts are affected. It would have been illogical for the legislature to have given to this small group the uncontrolled power to determine school boundaries for the larger adjoining district. The county unification elections would have been rendered a nullity, insofar as this boundary is concerned, by the action of a few.

CONCLUSION

The issues presented in this appeal have been once heard and determined by this court. The appeal should, therefore, be dismissed and the judgment below affirmed.